INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitution, statutes and regulations involved	2
Statement	7
Reasons for granting the writ	14
Conclusion	27
Appendix A	1a
Appendix B	17a

CITATIONS

Cases:

Barr, Eleanor H., In the Matter of, claiming as widow of 1st Lt. Robert A. Barr, deceased National Guardsman, 10 ECAB 206	20
Baur v. *Calic*, 166 Md. 387, 171 Atl. 713	22
Blackwell v. *United States* (C.A. 5, No. 20121)	16–17
Callaway v. *Garber*, 289 F. 2d 171	21
Courtney v. *United States*, 230 F. 2d 112	13, 17, 25
Dover v. *United States*, 192 F. 2d 431	16
Elmo v. *United States*, 197 F. 2d 230	13, 17, 25
Freis v. *United States*, 170 F. 2d 726, certiorari denied, 336 U.S. 954	21, 23
Gallagher's Estate v. *Battle*, 209 Md. 592, 122 A. 2d 93, certiorari denied, 352 U.S. 894	22
Henkelmann v. *Metropolitan Insurance Co.*, 180 Md. 591, 26 A. 2d 418	22, 23
Keitz v. *National Paving & Contracting Co.*, 214 Md. 479, 134 A. 2d 296	22

708-590—63——1

Cases—Continued

	Page
Layne v. *United States*, 295 F. 2d 433 certiorari denied, 368 U.S. 990	19
Leuchman v. *Belknap Hardware & Mfg. Co.*, 260 Ky. 123, 84 S.W. 2d 46	23
McCranie v. *United States*, 199 F. 2d 581	16
NLRB v. *Hearst Publications*, 322 U.S. 111	19
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504	19
O'Toole v. *United States*, 206 F. 2d 912	17
Pattno v. *United States*, 311 F. 2d 604, certiorari denied, 373 U.S. 911	16, 17, 24, 26
Storer Broadcasting Co. v. *United States*, 251 F. 2d 268, certiorari denied, 356 U.S. 951	16, 17
United States v. *Duncan*, 197 F. 2d 233	13, 17, 25
United States v. *Holly*, 192 F. 2d 221	13, 17, 25
United States v. *Wendt*, 242 F. 2d 854	13, 17, 25
United States ex rel Gillett v. *Dern*, 74 F. 2d 485	17
Williams v. *United States*, 350 U.S. 857	21
Williams v. *United States*, 189 F. 2d 607	16
Constitution, statutes and regulations:	
Constitution:	
Art. 1, Sec. 8, Cl. 16	3, 7, 19a
Statutes:	
Acts of Maryland General Assembly, Oct. Nov. Sess., 1678, 7 Archives of Maryland (Md. Hist. Society 1889) 59	17a
Act of April 23, 1808, 2 Stat. 490	17a
Act of Feb. 12, 1887, 24 Stat. 401	17a
Act of May 8, 1792, Sec. 1, 1 Stat. 271	17a
Act of Jan. 21, 1903, 32 Stat. 777	17a
Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673	18a
Act of June 19, 1935, ch. 277, 49 Stat. 391	19a

Constitution, statutes and regulations—Con.

Statutes—Continued

	Page
Act of July 16, 1946, ch. 583, § 1, 60 Stat. 556	20a
Act of Sept. 1, 1954, 68 Stat. 1059	21a
Act of June 15, 1956, 70 Stat. 283, 5 U.S.C. 84d	19, 21a
Act of July 2, 1956, ch. 488, title V, § 501, 70 Stat. 466	21a
Federal Tort Claims Act:	
28 U.S.C. 1346(b)	3, 15, 21
28 U.S.C. 2671	3
Md. Anno. Code, Art. 65, § 10	17a
Md. Rev. Code of 1878, Art. 18, § 28-33	17a
National Defense Act of 1916 (39 Stat. 166, et seq.):	
Section 83, 32 U.S.C. 702	26, 17a, 18a
Section 87, 32 U.S.C. 710	26, 17a, 18a
Section 90, 32 U.S.C. 709	4, 7, 8, 9, 14, 18, 24, 17a, 18a
Section 91, 32 U.S.C. 501	7, 19a
Section 93, 32 U.S.C. 105	8, 26, 17a
Section 61, 32 U.S.C. 109	8
Section 116, 32 U.S.C. 108	8
Section 117, 32 U.S.C. 101	7
Pub. L. 85-117 (Aug. 2, 1957) title V, §501, 71 Stat. 322	20a
Pub. L. 86-740 (Sept. 13, 1960, 74 Stat. 878) 32 U.S.C. (Supp. II) 715	16, 20, 22a
Pub. L. 87-224, Sept. 13, 1961, 75 Stat. 496, 5 U.S.C. (Supp. IV) 84d	19, 21a
R.S. § 1661	17a
10 U.S.C. 3079	7
10 U.S.C. 8079	7
32 U.S.C. (Supp. IV) 709(f)	19, 21a
42 U.S.C. 418	19, 21a

Constitution, statutes and regulations—Con.

Regulations:

	Page
Air National Guard Regulations (ANGR) 40–01	8, 10
Army National Guard Regulations (NGR51)	19

Miscellaneous:

10 Comp. Dec. 227, 228	17a
14 Comp. Dec. 631	17a
21 Comp. Gen. Dec. 305	5, 20a
106 Cong. Rec. 18383	23a
Hearings before House Appropriations Committee, 84th Cong., 2d Sess., Vol. 4, relative to Dept of Air Force appropriation for fiscal year 1957	9, 20a
Hearings on H.R. 5435 and 9315, House Judiciary Committee, 86th Cong., 2d Sess	22a
Historical Note, 32 U.S.C., pp. 5768–9	20a, 21a
H. Rep. 1031, 69th Cong., 1st Sess	27, 18a
H. Rep. 1698, 83d Cong., 2d Sess	19, 21a
H. Rep. 1928, 86th Cong., 2d Sess	20, 22a, 23a
H. Rep. 786, 87th Cong., 1st Sess	19, 21a
Restatement, *Agency 2d:*	
Section 220	13, 21
Section 227	13, 21
Section 228	13
Sen Rep. 785, 69th Cong., 1st Sess	27, 18a
Sen. Rep. 635, 74th Cong., 1st Sess	18, 19a
Sen. Rep. 1987, 83d Cong., 2d Sess	19, 21a
Sen. Rep. 2045, 84th Cong., 2d Sess	19, 21a
Sen. Rept. 1502, 86th Cong., 2d Sess	20, 22a, 23a
Sen. Rep. 709, 87th Cong., 1st Sess	19, 21a

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL.; STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, ET AL.; AND CAPITAL AIRLINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on June 13, 1963.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court on the issue of vicarious liability (J.A. 679–688),[1] and the opinions of the district court on negligence and damages (J.A. 725–728, 789–790) are unreported. The opinion of the court of appeals (App., *infra*, pp. 1a–14a) has not yet been reported.

[1] "J.A." references are to the Joint Appendix filed in the court of appeals, nine copies of which have been filed in this Court.

JURISDICTION

The judgments of the court of appeals were entered on June 13, 1963 (App., *infra*, pp. 15a–16a). By order dated September 7, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether members of the National Guard of the States, acting as civilian employees of the Guard and receiving pay from federal funds in that capacity, are employees of the United States within the meaning of the Federal Tort Claims Act.

2. Whether, assuming such persons are federal employees, the applicable federal statute and regulations confer upon the United States a right to control and supervise these activities sufficient to justify the imposition upon the government of vicarious tort liability.

CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

1. The Constitution of the United States provides in pertinent part:

> Art. I, Sec. 8. The Congress shall have Power * * *
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the

Militia according to the discipline prescribed by Congress; * * *

2. The Federal Tort Claims Act provides in pertinent part (Title 28, United States Code):

§ 1346: *United States as defendant.*

* * * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

§ 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * * *

"Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

3. The National Defense Act of 1916 (39 Stat. 166), as amended, provides in pertinent part (Title 32, United States Code):

Section 709. *Caretakers and clerks.*

(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

* * * * *

(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

* * * * *

(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them.

4. The Air National Guard Regulations (ANGR) 40–01 (20 Dec. 1954) provided in pertinent part:

Section I

* * * * *

a. Section I

* * * * *

2. Policy:

* * * * *

b. Air National Guard civilian personnel must be federally recognized members of the Air National Guard of the State, Territory, Puerto Rico, or the District of Columbia except for the employment of:

(1) Females (when specifically authorized by the Chief, National Guard Bureau).

(2) Temporary personnel paid from funds other than those designated for the pay of air technicians.

c. Officers will not be appointed to Air National Guard civilian personnel positions authorized for airmen, nor will airmen be appointed to positions authorized for officers.

* * * * *

i. Air National Guard civilian personnel will occupy the T/O vacancy most comparable to that civilian position.

* * * * *

3. Authority:

a. Basic authority for the employment of Air National Guard civilian personnel is contained in Section 90, National Defense Act, as amended.

b. Authority is delegated to the adjutants general of the several States, Terri-

tories, Puerto Rico, and the District of Columbia, to employ, fix rates of pay, establish work hours (a minimum of 40 hours per week), supervise, and discharge employees within the purview of this regulation; subject to the provisions of law and such instructions as may be subsequently issued by the Chief, National Guard Bureau.

4. Status. Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp. Gen. Dec. 305).

5. Definitions. For the purpose of this Regulation:

a. "Air National Guard civilian personnel" means any and all civilians employed by the several States, Territories, Puerto Rico, and the District of Columbia, permanent or temporary, male or female, supported wholly or in part by Federal funds appropriated for that purpose, including but not limited to the following:

(1) "Air technician" means a person employed for the performance of the duties of positions listed on the manning guide and paid from funds designated for the pay of air technicians.

* * * * *

b. Section III

7. Appointment:

a. *Authority.* Appointment of Air National Guard civilian personnel is a function of the adjutant general.

* * * * *

STATEMENT

On the morning of May 20, 1958, a Viscount passenger airplane owned by Capital Airlines collided over Brunswick, Maryland, with a jet trainer airplane owned by the United States and assigned to the Air National Guard of Maryland. Both airplanes were destroyed, and all of the passengers and crews, except the pilot of the jet trainer, were killed. At the time of the accident, the pilot of the trainer was both a commissioned officer in the Maryland Air National Guard and a civilian air technician paid with federal funds pursuant to the so-called "caretaker" statute, 32 U.S.C. 709.

These suits brought under the Federal Tort Claims Act, seek to impose liability on the United States for the pilot's alleged negligence.

1. BACKGROUND

(a) *The National Guard:* The National Guard is a constituent part of the militia of each State. 32 U.S.C. 101(4) and (6); 10 U.S.C. 3079, 8079. While the federal government prescribes its discipline, furnishes it with arms and supplies, and provides compensation for its members, the actual recruitment, selection, and training of National Guard personnel are reserved to the States. (Constitution, Art. I, Sec. 8, Cl. 16; 32 U.S.C. 101(4) and (6), 501; J.A. 290.) To qualify for federal support, the State units are required to maintain "federal recognition" by passing annual inspections designed to assure that their members, organization, training, instruction

and property meet prescribed federal standards. 32 U.S.C. 105, 108. But unless and until the Guard is called into active federal service, it is subject to the exclusive command and control of the governor and other State officials, and its officers and men, although "federally recognized," are not considered officers or employees of the United States. 32 U.S.C., 109(b); J.A. 282.

(b) *The Air Technician Program:* 32 U.S.C. 709, the so-called "caretaker" statute, provides, *inter alia,* that "funds allotted by [the Secretary of the Air Force] for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard" (par. (a)) and that the Secretary "shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them" (Par. (f)). Under regulations issued pursuant to Section 709 (now ANGR 40–01, dated Sept. 21, 1962; the regulations in effect at the time of the accident were substantively the same), authority to employ, supervise and discharge civilian personnel of the Air National Guard (including air technicians), is delegated to the adjutants general of the several States (Sec. 1, par. 3(b)). With certain exceptions not here relevant, such personnel must be members or officers of the Air National Guard (*id.,* par. (2)). The regulations declare that "Air National Guard civilian personnel are considered to be employees of the State * * *" (*id.,* par. 4).

The regulations accurately describe the air technician program both as it actually operated in 1958 and as it operates today. Civilian air technicians constitute about 19% of the personnel of the Air National Guard and are considered its "backbone." Although the majority are enlisted men, officers in squadrons hold air technician positions such as base commander, operations training supervisor, flying training supervisors, supply officers and maintenance officers (J.A. 293). The grade, status, and promotions of the civilian employees are determined by State officials acting for the Governor (J.A. 295). State officers also determine the hours and working conditions of the civilian employees, supervise their daily work, and give work assignments pursuant to State policy (J.A. 295). No federal officers or agencies have authority to promote or discharge the civilian personnel, or to assign, control or supervise their daily work (J.A. 295–296). Finally, although Section 709(f) authorizes the Secretary of the Air Force to fix the salaries of the "caretakers," many States pay less than the maximum amount specified by the Secretary, while others pay more than the federal maximum, augmenting the federal money with State funds (J.A. 293–294).

The civilian employees of the National Guard are not within the federal civil service[2] nor do they receive the disability, death and retirement benefits provided by the Federal Civil Service Retirement

[2] Volume 4, Hearings before the House Appropriations Committee, 84th Cong., 2d Sess., relative to the Department of the Air Force appropriation for the fiscal year 1957, pp. 998–999.

System (ANGR, Sec. 1, par. 14). However, under the policy of the Bureau of Employees' Compensation of the United States Department of Labor, Federal Employee Compensation benefits are payable upon the injury or death of such employees while performing their duties (App. 7a).

2. THE FACTS OF THIS CASE

Captain McCoy held a commission from the Governor of Maryland as a captain in the Maryland Air National Guard (J.A. 37, 661). A jet fighter pilot on flying status, he was assigned to the 104th Fighter-Interceptor Squadron, stationed at Martin Field, near Baltimore. His military duties also included service as the "aircraft maintenance officer" of the Squadron (J.A. 92, 131). In his capacity as civilian air technician, Captain McCoy held the position of Aircraft Maintenance Chief and Acting Maintenance Supervisor. As such, he was in charge of the maintenance of 28 airplanes owned by the United States and assigned to the 104th Squadron (J.A. 681). At no relevant time was the Squadron in the active federal service (J.A. 283).

For some time prior to May 20, 1958, Captain McCoy had been attempting to interest an acquaintance of his, Donald Chalmers, in joining the Maryland Air National Guard (J.A. 83). On the prior Saturday he had requested permission from his commanding officer, Lt. Col. Kilkowski, to take Chalmers as a passenger on a flight, with a view to increasing his interest in the Guard (J.A. 63, 139). On May 20,

Col. Kilkowski authorized Captain McCoy to make such a flight with Chalmers (J.A. 139, 151). The flight order, issued by order of the commanding officer of the 104th Fighter Squadron, and authorized by the Maryland Air National Guard, directed Captain McCoy to make a flight "for purpose of maintaining flying proficiency"[3] (J.A. 209, 207). Apparently because of the passenger, the flight was to be made in one of the unit's two training airplanes, rather than in one of the fighters. Although the flight was primarily a "proficiency" (*i.e.*, training)[4] flight, Captain McCoy also checked the efficiency of the equipment to determine whether it was working properly (J.A. 684). To that extent, the flight was related to his civilian maintenance job. And since he had qualified for all of the military flight pay to which he was entitled for the period in question, and the flight occurred during a day on which he was acting as a civilian air technician, he was drawing compensation

---

[3] Captain McCoy was a rated pilot on flying status. In order to maintain that rating, he was required to fly 100 hours a year.

[4] Part of the training of flying officers of the Air National Guard consists of "proficiency flights," which are training flights not test flights (J.A. 161–162). See App. 5a, and fn. 5, *infra*, p. 12.

Although the requirement of 100 hours' annual flying time is federal, the times, routes and methods of performing flights in Air National Guard planes were controlled by state officers (J.A. 283–285, 300, 337–338). Many proficiency flights of the 104th Squadron were made at times other than the organized drills, both by air technicians and other pilots of the unit (J.A. 68).

during the period of the flight in his civilian capacity as an air technician (J.A. 599).[5] It was this flight which resulted in the collision giving rise to this litigation.[6]

3. THE PROCEEDINGS BELOW

Capital Airlines, together with the survivors of the pilot and co-pilot of its airplane, brought these suits under the Tort Claims Act, asserting that the United States was responsible for Captain McCoy's negligence in piloting the airplane. The district court held a trial on the preliminary question whether Captain McCoy was an employee of the United States acting within the scope of his employment. While the court made extensive findings as to Captain McCoy's civilian and military employment (J.A. 679–688), it made no findings as to whether any federal official had the right to hire, supervise, or discharge him, or to control

[5] Although air technicians are on civilian pay status during their regular work week, they receive flight pay in their military capacity for any proficiency flights they undertake, unless they have already qualified for all the flight pay they are entitled to receive for the period (J.S. 153–154). When the pilot has qualified for all of the flight pay, he is, when flying, considered to be on inactive military duty training status without military pay (J.A. 128, 155). In such circumstances however, he can receive civilian pay as an air technician for the period of the flight (J.A. 156).

[6] Suits arising out of the same collision have also been filed in Pennsylvania, Illinois, Ohio and New York. The two Pennsylvania actions have been tried (largely upon the record made in these cases), and resulted in judgments of $427,000 against the United States. The government's appeals in these two cases have been briefed and argued, but are still pending in the Court of Appeals for the Third Circuit (Nos. 14041 and 14042).

him in the performance of his work. The court found that at the time of the accident "Captain McCoy was at least in part carrying out his civilian work as Aircraft Maintenance Chief and Acting Maintenance Supervisor" (J.A. 687). It ruled, moreover, as a matter of law, that a person employed as an air technician (caretaker) in a non-activated National Guard Unit is an employee of the United States within the meaning of the Federal Tort Claims Act (J.A. 688).

The remaining issues were then tried separately to the district court, which found Captain McCoy's negligence to be the sole proximate cause of the accident and entered judgments for Capital Airlines and the individual plaintiffs.

The government appealed from the judgments on the questions of its responsibility for the actions of Captain McCoy, and the amount of damages awarded to Capital Airlines. On the authority of *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10) and subsequent cases,[1] the court of appeals held that, as an air technician receiving pay pursuant to the caretaker statute, Captain McCoy was an employee of the federal government (App. 6a). Moreover, while recognizing that in Maryland, as in most other States,[2] an employer can be held accountable for the torts of an employee only if he has the right to direct and control the very activity which causes the injury (App. 11a–12a), the

[1] *Elma* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9).

[2] See, Restatement, *Agency 2d*, §§ 220, 227, 228.

court held that the United States did have "the ultimate right of control over" Captain McCoy (App. 7a). Accordingly, it affirmed the decision of the district court.[9]

REASONS FOR GRANTING THE WRIT

These cases present important issues as to the liability of the United States under the Federal Tort Claims Act for the tortious conduct of civilian personnel of the National Guard who receive compensation from federal funds under the so-called "caretaker" statute (32 U.S.C. 709). Two distinct, though related, questions are involved, both of which, we urge, were wrongly decided by the court below and warrant definitive resolution by this Court. The first question is whether civilian personnel of the National Guard are "employees" of the United States within the meaning of the Tort Claims Act. The second question is whether—assuming that such persons are "employees" of the United States—the applicable federal statute and regulations give federal officials the right to direct and control them in the performance of their duties; for only if such right exists would the United States, "if a private person, * * * be liable to the claimant in accordance with the law of the place where the act or omission occurred," (28 U.S.C. 1346(b)) in this instance, Maryland. The court of appeals answered both of

[9] On the question of damages to Capital Airlines, the court held that the district court had erred in awarding Capital the reproduction cost of its airplane, rather than its fair market value, and reversed and remanded the judgment in regard to Capital Airlines for a finding of damages based upon fair market value (App. 12a–14a).

these questions in the affirmative. On the second issue, its decision is in conflict with a recent decision of the Tenth Circuit.[10]

Civilian employees of the Air National Guard, including technicians, make up 19 percent of the total membership and number more than 14,800 employees. Since they are on duty a full work week, they are considered its "backbone" (App. B, *infra*, p. 20a). Similarly, there are approximately 21,800 civilian employees of the Army National Guard.[11] The question of the government's responsibility under the Tort Claims Act for the conduct of such employees has been a subject of recurrent litigation involving substantial sums of money. Indeed, the single air crash giving rise to these actions has resulted in judgments against the United States of $2,063,050,[12] and 11 other

---

[10] One might phrase the two questions as one: Whether the United States may be held liable, under the Tort Claims statute, for acts performed by civilian personnel of the National Guard. Certainly, it is true that factors relevant to the question whether such persons are properly deemed federal employees at all are relevant, also, for purposes of determining the degree of federal control over their activities. But since the federal Act uses the term "employee of the government," we consider, first, the question of employment status and, secondly, whether in any event the United States exercises a measure of control which would bring into play the State's rule of *respondeat superior*.

[11] Estimates of strength are as of June 30, 1963.

[12] In addition to the three cases at bar, two actions involving judgments of $427,000 are now on appeal to the Third Circuit (Nos. 14041 and 14042). See fn. 6, *supra*, p. 12. The amount of the award in the *Capital Airlines* case should be reduced (see footnote 9, *supra*, p. 14). On October 8, 1963, the district court made findings, which, if sustained, would reduce Capital's judgment by $130,000, leaving a total of $1,933,050 in existing judgments.

actions seeking more than $3,495,000 in damages are still pending.[13]

The prospective importance of these issues is not significantly diminished by the fact that in 1960 Congress provided for a limited administrative settlement of claims arising out of torts committed by National Guard personnel (32 U.S.C. (Supp. II) 715; see *infra*, pp. 21a–23a). For, as the court below indicated (App. 10a), the new statute creating that remedy contains no provision making it exclusive. Thus, if the court of appeals is correct in holding that the United States is answerable in damages for the conduct of such employees under the Tort Claims Act, claimants may have a choice of remedies, one under the new statute and the other under the Tort Claims Act, and would be free to pursue both.

1. The courts of appeals have uniformly and correctly held that members of the National Guard performing training and other military duties (except when called into active federal service) are not employees of the United States within the meaning of the Federal Tort Claims Act.[14] With equal consist-

[13] Although there are 11 actions, they involve only 7 deaths. The actual amount of damages is likely, of course, to be substantially less than the amount claimed.

[14] *Williams* v. *United States*, 189 F. 2d 607 (C.A. 10); *Dyer* v. *United States*, 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States*, 199 F. 2d 581 (C.A. 5); *Storer Broadcasting Co.* v. *United States*, 251 F. 2d 268 (C.A. 5), certiorari denied, 356 U.S. 951; *Braslow* v. *United States*, 309 F. 2d 465 (C.A. 6); *Pattno* v. *United States*, 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911; *Blackwell* v. *United States* (C.A. 5, No. 20121). Some of the district court cases are collected in *Storer Broadcasting Co.* v. *United States*, *supra*. Accord:

ency—but incorrectly in our view—they have held that members of the Guard acting in the capacity of full-time civilian "caretakers" or air technicians are federal employees.[15] There is no reasonable basis for the dichotomy which has thus developed.

Civilian employees of the National Guard, like members and officers performing military functions, are paid from federal funds. In both cases, the federal government sets standards which the National Guard units must meet in order to receive federal support. But unless and until the unit is called into active federal service, the State and its officials exercise the exclusive right to command and control the activities of the Guardsmen, both in their military and civilian capacities (*supra*, pp. 7–10). In each case the State officials select from qualified candidates the person to be enlisted and employed, and have the exclusive

United States ex rel Gillett v. *Dern*, 74 F. 2d 485, 487 (C.A. D.C.); *O'Toole* v. *United States*, 206 F. 2d 912 (C.A. 3) (where members of the National Guard of the District of Columbia were held to be federal employees, because that organization is under the direct command of the President, who appoints its officers and who, through a direct chain of command, controls its activities).

[15] *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10); *Elmo* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 142 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9). In *Pattno* v. *United States*, 311 F. 2d 604 (C.A. 10), certiorari denied, 373 U.S. 911, of course, the court held that the officer air technician was an employee of the United States (311 F. 2d at 606–607) but denied liability on the ground that he was on loan to and under control of the state. See *infra*, pp. 24–26.

right to promote, demote, or discharge them.[16] In neither case does any federal official have authority to supervise the conduct of the Guard members. These considerations, which have led the courts to hold unanimously that National Guard members engaged in training and other military duties are not federal employees, compel the same conclusion in the case of the Guard's civilian caretakers and air technicians.

Nothing in the language or history of either the "caretaker" statute (32 U.S.C. 709) or the Tort Claims Act justifies the difference in treatment. The former provision simply declares that "funds allotted" to the States for the National Guard "may be spent for the compensation of competent persons to care for material, armament, and equipment" and that the "Secretary [of the Air Force] shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them" (*supra*, p. 4). It is clear from the legislative history that Congress intended and understood that the person "designated" by the Secretary to "employ" the caretakers would be a State, rather than a federal, official (Sen. Rep. No. 635, 74th Cong., 1st Sess., pp. 2–3), and that those receiving pay under Section 709 would be employees of the States and not the federal government (App. B, *infra*, pp. 17a–19a). In accordance with that understanding, the regulations under Section 709 provide that "Air National

[16] In each case the federal government may cut off funds for unqualified persons and thus in most instances cause their discharge. See J.A. 289–290.

Guard civilian personnel are considered to be employees of the State * * *," and delegate to the adjutants general of the several States the authority to employ, supervise, and discharge such employees, fix their rates of pay and establish their working hours (*supra*, pp. 5–6).[17]

The civilian personnel of the National Guard, moreover, are deemed by Congress to be State employees for Social Security purposes[18] and for purposes of the payroll deductions for State retirement funds;[19] they are not within the federal civil service and are ineligible to receive the disability, death and retirement benefits provided by the Civil Service Retirement System (*supra*, pp. 9–10).[20]

---

[17] The Army National Guard regulations are to the same effect (NGR 51, Sec. 1, par. 4(b)).

[18] 42 U.S.C. 418(b)(5); H. Rep. 1698, 83d Cong., 2d Sess., p. 50; Sen. Rep. 1987, 83d Cong., 2d Sess., pp. 45–46.

[19] 5 U.S.C. 84d; Sen. Rep. 2045, 84th Cong., 2d Sess., p. 1; see also 5 U.S.C. (Supp. IV) 84d and 32 U.S.C. (Supp. IV) 709(f) (concerning federal contribution to State retirement funds); H. Rep. 786, Sen. Rep. 709, 87th Cong., 1st Sess.

[20] To be sure, the Bureau of Employees' Compensation awards such employees benefits under the Federal Employees' Compensation Act (App 7s). However, the concept of employment under workmen's compensation acts and other remedial legislation is much broader than the relationship which imposes vicarious liability under principles of common law. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 120–122; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 506–507. For similar reasons, *Layne* v. *United States*, 295 F. 2d 433 (C.A. 7), certiorari denied, 368 U.S. 996, relied upon by respondents below, is not in point. Indeed, federal compensation under the Act is awarded to National Guardsmen training in summer camp in their military capacity. (*In the Matter of Eleanor M. Barr, claiming as widow of 1st Lt. Robert A. Barr, deceased National Guards-*

We note, finally, that in 1960 Congress rejected a bill which would have expanded the coverage of the Federal Tort Claims Act to make the United States liable for the negligence of National Guard personnel, both civilian and military (see discussion in App. B, *infra*, pp. 21a–23a). Instead, adopting the recommendation of the Department of the Army, it established a limited administrative remedy for claims resulting from the activities of both classes of Guard employees (32 U.S.C. (Supp. II) 715).[21] The Senate Committee gave the following explanation for its refusal to modify the Tort Claims Act (Sen. Rep. 1502, 86th Cong., 2d Sess., p. 4):

> The crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. * * *

Similarly, the House Committee believed that it would be "unwise to extend the coverage" of the Act to include conduct of civilian and military members of the Guard, since "Federal authorities do not have command and control over National Guard units and members not in active Federal service." H. Rep. 1928, 86th Cong., 2d Sess., p. 4. That reasoning is no less applicable to the civilian personnel of the Guard than to members who perform purely military

Bain, 10 ECAB 206), in circumstances where the United States would not be held liable for their conduct under the Tort Claims Act (fn. 14, *supra*, pp. 16–17).

[21] This amendment authorizes the Secretary of the Army and the Secretary of the Air Force to settle and pay claims in an amount not more than $5,000 and to report amounts in excess of that ceiling to Congress for its consideration.

duties, a fact which Congress impliedly recognized when it made the same administrative remedy available for the conduct of both categories of employees.

2. (a) Even if civilian personnel receiving compensation under the "caretaker" statute are assumed to be federal employees, it does not follow that the United States is answerable for their torts. Under the Federal Tort Claims Act, the United States is accountable for the negligent conduct of an employee within the scope of his employment only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law" of the State (28 U.S.C. 1346).[22] In most, if not all, of the States, the law of *respondeat superior* recognizes the fundamental unfairness of subjecting the employer to vicarious tort liability unless he has the right to direct and control the very activities of the servant which give rise to the injury.[23] As we have already shown (*supra*, pp. 7–10), civilian employees of the National Guard, although compensated by federal funds, are under the exclusive command and supervision of State officials. Only State officials have the right to tell them when, where and how to perform their duties.

In the cases at bar, the orders authorizing and directing the flight in question, and prescribing its route,

[22] 28 U.S.C. 1346(b); *Williams* v. *United States*, 350 U.S. 857; *Fries* v. *United States*, 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Calloway* v. *Garber*, 289 F. 2d 171 (C.A. 9).

[23] Restatement, *Agency 2d*, §§ 220, 227.

were signed by the order of the Commander of the 104th Squadron, whose authority was, of course, derived from the Governor of Maryland through the Adjutant General of Maryland (J.A. 209, 207, 293–295). No federal officer or employee had any right to authorize or direct the flight, to prescribe an itinerary, or in any other way physically to control or supervise Captain McCoy's piloting of the airplane. And in Maryland, as in most other States, the law of *respondeat superior* imposes vicarious tort liability only if the asserted master has the right to control and direct the particular activities giving rise to the injury.[24] Only upon a mistaken belief that Federal officials had a right to control and supervise McCoy could the United States be held accountable for his negligence.

The result reached by the court of appeals did not stem from any misapprehension as to State law. Indeed, the court quoted at length (App. 11a–12a) a leading Maryland decision, *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301, emphasizing, as the decisive test of liability, whether the employer had the *"right to control and direct the servant in the performance of his work and in the manner in which the work is to be done"* (emphasis in original). Its error—an error of federal

[24] *E.g.*, *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 26 A. 2d 418; *Gallagher's Estate* v. *Battle*, 209 Md. 592, 122 A. 2d 93, certiorari denied, 352 U.S. 894. The Maryland cases allow the imposition of liability on two masters only when each retains the concurrent authority to control the activities of the servant. *Baur* v. *Calic*, 166 Md. 387, 401, 171 Atl. 713.

law—was in holding that "in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident" (App. 7a).[25] That conclusion reflects a fundamental misunderstanding of the nature of the federal government's role under the caretaker statute and pursuant regulations. The relationship of the government to civilian personnel of the National Guard is not, as the court below supposed (App. 7a), comparable to that of a plant owner who exercises ultimate control over his employees, though delegating the task of immediate supervision to a "foreman" (the State). Rather, the function of the Secretary of the Army and Air Force under the caretaker statute, and indeed under the National Defense Act as a whole, is simply to pre-

[25] The court below also erred in believing that an "ultimate" right of control would be enough to justify the imposition of vicarious tort liability. In that regard the court's approach is strikingly at variance with that of the Sixth Circuit in *Fries* v. *United States*, 170 F. 2d 726, certiorari denied, 336 U. S. 954. There the court held that the United States was not responsible under the Federal Tort Claims Act for the acts of persons who, though concededly federal employees receiving federal pay, were on loan to a local government and engaged in a project under the sole supervision of a local official. The *respondeat superior* law of Kentucky, to which the court in *Fries* was referred by the Tort Claims Act, was essentially the same as that of Maryland in requiring, as a prerequisite to vicarious tort liability, a right to control the very activity giving rise to the injury. *Henkelmann* v. *Metropolitan Life Insurance Co.*, 180 Md. 591, 601, 26 A. 2d 418, relying upon *Leachman* v. *Belknap Hardware & Mfg. Co.*, 260 Ky 123, 84 S.W. 2d 46.

scribe standards, allocate funds, and fix the limits of Federal funds to be used for salaries. In no meaningful sense does any federal official—except of course, when the Guard is on active federal service—have the right, "ultimate" or otherwise, to supervise the actual performance of their duties by National Guard personnel, whether civilian or military. To be sure, such authority could be created by a statutory amendment, and conceivably even by a major revision of the regulations. Plainly, however, the legal responsibility of the United States for the negligence of National Guard employees does not depend upon the supervisory powers federal officials might have under some hypothetical regulatory scheme, but rather upon the right of control (or lack of it) which is theirs under the existing system.

b. On this issue, the decision below conflicts with the recent decision of the Tenth Circuit in *Puttno* v. *United States*, 311 F. 2d 604, certiorari denied, 373 U.S. 911. There, the plaintiff sought damages from the United States for injuries caused by the alleged negligence of the pilots of two jet fighters owned by the United States, but assigned to the Wyoming Air National Guard. One of the pilots, in addition to being a National Guard officer, was a civilian flying instructor receiving salary pursuant to 32 U.S.C. 709[26] (311 F. 2d at 606; R. 32).[27] At the time of the

[26] The other pilot was simply an officer of the Guard, and not a civilian employee. In accord with the consistent holdings of that and other courts, the court held that he was an employee of the State for whose acts the United States was not liable. 311 F. 2d at 605–606.

[27] "R." references are to the printed record in *Puttno*, a copy of which has been made available to opposing counsel.

accident, he was receiving pay as a civilian employee and was engaged in a training flight to evaluate the proficiency of the other pilot—the very function for which he had been employed as an air technician (R. 60–61). Although holding that a civilian employee of the National Guard appointed pursuant to the "caretaker" statute is a federal employee,[28] the court nonetheless denied recovery on the ground that the flight was under the exclusive control and supervision of the State and in furtherance of the State's business, and that the Wyoming law of *respondeat superior* (like that of Maryland and of the States generally) did not impose vicarious liability on an employer for the tortious conduct of a servant acting under the sole direction and upon the business of another."

---

[28] Following its decision in *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10). Compare, pp. 16–21, *supra*.

[29] The so-called caretaker decisions of the courts of appeals are not to the contrary. *United States* v. *Holly*, 192 F. 2d 221 (C.A. 10); *Elgin* v. *United States*, 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan*, 197 F. 2d 233 (C.A. 5); *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2); *United States* v. *Wendt*, 242 F. 2d 854 (C.A. 9). Each of these cases involved only the question of whether civilian employees of the National Guard, receiving pay pursuant to the caretaker statute, were employees of the United States within the meaning of the Tort Claims Act. (For a further discussion of this issue and these cases see *supra*, pp. 16–19.) In none was there any dispute between the parties as to whether the applicable State law of *respondeat superior* would impose vicarious tort liability on a private employer in like circumstances.

The court in *Wendt* raised the issue *sua sponte* and ruled that there would be liability under the *respondeat superior* law of the State of Washington. It did not focus on the

The court below attempted to distinguish *Pattno*, not by pointing to any difference between the law of Wyoming and that of Maryland (for there was none), but rather on the ground that the flight in that case was a training flight, whereas the one in the present case was (in part) "within the caretaker [maintenance] function" (App. 5a, 6a, fns 2, 3). That distinction is plainly insubstantial. In the first place, although Captain McCoy admittedly made certain equipment checks during the course of the flight (J.A. 684), the primary and official purpose of the flight was to keep up his proficiency as a pilot; it was chiefly a "training," not a "test," flight (supra, pp. 11–12, fns. 4–5).

Furthermore, no different result would be warranted even if the *sole* motion of the flight had been to test the plane for maintenance purposes. The maintenance duties, too, were part of the business of the State, for the National Defense Act charges the State with responsibility for the care and maintenance of all federal equipment assigned to the National Guard (32 U.S.C. 105(a)(1), 702 (a) and (d), 710(c); J.A. 287–288). Moreover, in adopting subsection (d) of the caretaker statute, the only provision which expressly authorizes the appointment of National Guard officers (as opposed to enlisted men) as caretakers, Congress specifically contemplated that these officers would be utilized in their civilian capacity both for the maintenance of equipment and for the supervision

---

question of the right to control the civilian employee, and accordingly we do not believe it appropriate to assert a conflict between that case and *Pattno*, *supra*.

of flying training (H. Rep. 1031, 69th Cong., 1st Sess., p. 3; Sen. Rep. 785, 69th Cong., 1st Sess., p. 1). And, as we have observed, only State officials have authority to command civilian air technicians, whether their function be training or maintenance. Thus, it would be wholly unreasonable to make the liability of the United States turn upon whether, at the time of the accident, the air technician is engaged in flight training, in maintenance activity, or (like Captain McCoy) in both. Regardless of the particular task, the civilian employee is acting under the exclusive control of the State and performing part of the State's business.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

OCTOBER 1963.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 16953

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL., APPELLEES

No. 16954

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, WIDOW, ET AL., APPELLEES

No. 16955

UNITED STATES OF AMERICA, APPELLANT

v.

CAPITAL AIRLINES, INC., A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 13, 1963.

Mr. David L. Rose, Attorney, Department of Justice, with whom *Acting Assistant Attorney General Guilfoyle, Messrs. David C. Acheson,* United States

Attorney, *Morton Hollander, John G. Laughlin, Jr.*, and *Enoch E. Ellison*, Attorneys, Department of Justice, were on the brief, for appellant.

Mr. Richard W. Galiher, with whom *Mr. William E. Stewart, Jr.*, was on the brief, for appellees.

Before FAHY, DANAHER and BURGER, *Circuit Judges*.

FAHY, Circuit Judge: A mid-air collision occurred over Maryland between a jet plane owned by the United States, and used by the Maryland Air National Guard, and a passenger plane of Capital Airlines. The passengers and crew in the Capital plane were killed and the plane was destroyed. A passenger in the jet plane was also killed. The only other occupant of the jet plane was its pilot, Captain McCoy, who was ejected and came down safely by parachute.

The survivors of the pilot and co-pilot of the Capital plane sued the United States under the Federal Tort Claims Act. Capital also sued the United States under the same Act for damages due to loss of its plane. Negligence of the jet pilot was found at trial and judgment against the United States was entered for all plaintiffs. The United States appeals, but confines its contentions to questions involving the availability to plaintiffs of the Federal Tort Claims Act and the amount of damages awarded Capital for loss of its plane. Neither negligence on the part of Captain McCoy nor the amount of damages awarded to the individual plaintiffs is now contested.

Liability of the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), set forth in the margin,[1] depends upon whether the jet pilot was an

[1] Section 1346. United States as defendant.

"(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury

"employee of the Government" at the time of the accident; and, if so, was "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," which was Maryland.

Upon the basis of abundant evidence, followed by elaborate findings and conclusions, the District Court answered these questions in favor of plaintiffs. We think this answer was correct.

The Air National Guard of Maryland is part of the State Militia referred to in Article I, Sec. 8, of the Constitution. Congress is there empowered "to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States. * * *" Clause 16 of Sec. 8. Article I reserves to the States the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. At all times relevant to this case the Maryland Air National Guard had not been called into the actual service of the United States.

In order to improve the national defense Congress has extensively legislated and appropriated funds with respect to the Militia, which is organized, equipped and disciplined in accordance with Federal standards, though trained and officered by the States. Important equipment is supplied by the United States. The airplane operated by Captain McCoy when this acci-

---

or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

dent occurred was owned by the United States. 32 U.S.C. § 710(a). It had been allocated by the United States to the Maryland Air National Guard. It was maintained by personnel paid by the United States for that purpose, known as civilian air technicians, and also known as caretakers.

Captain McCoy was paid by the United States pursuant to 32 U.S.C. § 709(a), "to care for" this property. This pay was in addition to his National Guard compensation. See 32 U.S.C. § 709(b). The United States fixed the salary of those authorized to be "employed" as was Captain McCoy. 32 U.S.C. § 709(f) (Supp. 1962). Air Force regulations recognize this basic authority for the employment of civilian personnel. Employment under this authority is delegated to state adjutant generals, "subject to the provisions of law and such instructions as may be subsequently issued" under United States authority. Air National Guard Regulation No. 40-01, 20 Dec. 1954. The exercise of this authority is manifested by the Air National Guard Civilian Personnel Manual, issued 1 March 1958 "By Order of the Secretary of the Air Force" of the United States. The Manual prescribes *inter alia* the duties of civilian personnel in the Air National Guard in the situation of Captain McCoy. It also describes the qualifications, duties and responsibilities of positions which include those of "maintenance supervisor" and "aircraft maintenance chief."

Captain McCoy was also an officer of the National Guard of Maryland, commissioned by the Governor. He was assigned to 104th Fighter-Interceptor Squadron of the Maryland Air National Guard as "aircraft maintenance officer." This was in addition to his civilian job as "base maintenance supervisor" or "aircraft maintenance chief." Among his responsibilities

was that of flight-testing of aircraft. This was accomplished by flights called "proficiency flights" which, however, had multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of Captain McCoy in his employment under 32 U.S.C. § 709.* At the time of the flight that ended in this accident, which occurred on a Tuesday, Captain McCoy's pay status was that of an air technician, a status he bore throughout his normal work period of from eight a.m. to 4:30 o'clock p.m. during the week days. He was actually paid the day of the accident as an air technician, and such pay continued during his disability following the accident.

On this particular flight Captain McCoy was accompanied by the passenger who lost his life. This passenger was interested in joining the Air National Guard and in obtaining flight training. Captain McCoy indicated this to the Commander of the 104th Squadron, who concurred that the passenger could accompany Captain McCoy on the flight. The Commander gave permission for the flight. He explained the reasons for doing so as follows:

> A. The general reason for any flight of that nature is proficiency. You don't set up a flight for the express purpose of taking any individual up, the express purpose for flying is for your own general proficiency. If there is a seat available and the man qualifies in accordance with the regulations, it is permissible to take him up on that flight. The Air Force does it all the time.
>
> Q. Were there other reasons for the flight in question? A. I think as I mentioned before a

---

*It appears that flying these planes involved both a military and a civilian check on the plane's maintenance because of Captain McCoy's dual role, although it also appears that only personnel militarily qualified are permitted to fly the planes and that military pay can be awarded for such flying.

third reason for any flight is to insure that the equipment is in proper working order, to—well, as a result of each flight the maintenance officer takes, he has to fill out a form, whether the aircraft was okay, or whether it had even minor discrepancies which would be listed in the form. When he lands and comes back from the flight, this is done; so there is a third reason for the flight, which is to insure the proper maintenance of the equipment which he has general supervision over.

Q. As an aircraft technician? A. As an aircraft maintenance officer in the squadron and also as an air technician.

We hold with the District Court that in his civilian capacity as a caretaker of property of the United States Captain McCoy when on this flight, which entailed the performance of his caretaker and maintenance duties, was an employee of the United States within the terms of the Federal Tort Claims Act. See *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957).[3] He was so employed to assist the

[3] But see also the later case of *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), *cert. denied*, —— U.S. —— (1963), where the caretaker was held not within the Federal Tort Claims Act, the court concluding that when the accident occurred he was flying on a training program to evaluate the skill of another. We think this case distinguishable from the present case on the findings of the District Court, supported by the evidence, that the flight was within the caretaker function when the accident occurred.

In *Storer Broadcasting Co.* v. *United States*, 251 F. 2d 268 (5th Cir. 1958), the court said the only question presented was whether a member of the National Guard "who is not a

National Guard, but also to assist the United States. In his property maintenance function he was paid by, and the ultimate right of control over him was in, the United States. The functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. Such supervision as was lodged in the State did not make Captain McCoy an employee of Maryland. A foreman, for example, is not the employer of the one whose work he may in some respects supervise. There is of course a close relationship between the State of Maryland and the United States in the maintenance of federal property allocated to the Maryland National Guard, but this does not tip the balance toward the State on the issue of employment; for too much begins and remains with the United States in the case of these caretakers of federal property.

Perhaps the status of Captain McCoy can be described as an employment divided between Maryland and the United States, varying in relative amounts at different times and in different circumstances. But in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident, notwithstanding immediate authority or permission for the flight was given by the State through its militia officers. While such personnel are not within the Federal Civil Service the Federal Bureau of Employees' Compensation of the Department of Labor considers them to be federal employees entitled to compensation benefits under the Act it administers.

---

caretaker" and not in the active service of the United States is an "employee of the Government" within the meaning of the Federal Tort Claims Act.

The United States contends that Congress, since the events in this case, has rejected the effort to extend the coverage of the Federal Tort Claims Act to members and civilian employees of the National Guard. Reliance for this contention is placed upon 74 Stat. 878 (1960), 32 U.S.C. § 715 (Supp. 1962) and its history, including H.R. Rep. No. 1928, and S. Rep. No. 1502, 86th Cong., 2d Sess. (1960). We can by no means agree with this contention insofar as it bears upon the status of persons employed as civilians under 32 U.S.C. § 709. The Government's reference in its brief to the statement in the letter of the Deputy Attorney General to the Chairman of the Senate Committee on the Judiciary, set forth in the Senate Report, "To divorce responsibility from control is to forego any rational legal basis for payment," clearly misses the significance of the position of the Deputy Attorney General insofar as the present case is concerned. The thrust of his objection to the proposed legislation, S. 1764, 86th Cong., 2d Sess. (1960), which would have amended the Tort Claims Act as to both classes of persons, was that it would change existing law as to federal liability for acts of Guardsmen when on regular training duty under State control. As to the provision expressly including civilian caretakers under the term "employees of the Government," his position was that it was unnecessary because it would merely restate existing law.[4]

---

[4] As to federalized National Guardsmen and Section 709 employees the Deputy Attorney General stated:

"The same rationale that looks to the controlling organization holds that when National Guardsmen are actually under the control, in whole or in part, of regular Army or Air Force officers or other Federal personnel, the Government is liable for their negligence. In such instances, however, the proposed legislation would be unnecessary for the Government's respon-

This distinction between members of the National Guard and men employed pursuant to Section 709 appears also in the *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 86th Cong., 2d Sess. Ser. 22 (1960), where the First Assistant, Civil Division, Department of Justice, with reference to Section 709 employees, made a statement in terms identical to those used by the Deputy Attorney General. *Id.* at 6 and 7. See note 4, *supra*.

The new statute, 74 Stat. 878, 32 U.S.C. § 715 (Supp. 1962), though not adding to the coverage of the Tort Claims Act, creates authority in the Secretaries of the Army and Air Force to settle claims up to $5,000 arising out of National Guard activity even when the active agent is performing routine National Guard work under State control. And the active agent may be a Guardsman or a civilian employed under 32 U.S.C. § 709. Thus in one respect claimants are now in a better position than they were prior to passage of 74 Stat. 878 in 1960, in that they may successfully present their claims arising out of ordinary Guard activity such as training when the actor has been a Guardsman even though such per-

---

sibility already exists under the present provisions of the Federal Tort Claims Act.

"The provision which would expressly include within the definition of 'employee of Government' civilian employees of the National Guard who perform caretaker functions with respect to the National Guard's military equipment, and are separately paid for such services under title 32, United States Code, section 709, is also unnecessary and thus objectionable, for the same reason. For it has already been held under the principles we have discussed in an unbroken series of court decisions that, because of the control relationship between such persons and the Federal Government (and its property), the latter is responsible for their torts under the present provisions of the Federal Tort Claims Act."

Senate Report, *supra* at p. 11.

sons are not under federal control at the time. With respect to injuries caused by civilians employed under § 709 it would seem that the new statute creates a limited administrative recovery as an alternative to the traditional judicial one under the Federal Tort Claims Act.[5] However that may be, it is clear that as of the time here in question, 1958, the plaintiffs' remedy for injuries caused by civilian caretakers was under the Federal Tort Claims Act; and the history of this

[5] In reporting the bill out which became 74 Stat. 878, and not the one originally proposed, the Chairman of the Senate Committee on the Judiciary, Senator Eastland, commented that administrative coverage was being given to claims arising out of injuries caused by Guardsmen since when in a non-federal status they had been held not to be employees of the United States within the meaning of the Federal Tort Claims Act. No such explicit comment was made with reference to § 709 civilians, although the Senator appended to his report a letter from the Secretary of the Army which acknowledged that the Courts of Appeals had held that injuries caused by these caretakers were cognizable under the Federal Tort Claims Act since those employed under authority of § 709 were "employees of the Government" within the meaning of that Act. See S. Rep. No. 1502, 86th Cong., 2d Sess. 306 (1960). The Secretary cited these cases on the point: *Holly* v. *United States*, *Elmo* v. *United States*, *Courtney* v. *United States*, and *United States* v. *Wendt*, all *supra* at p. 6. And he went on to say that the view reflected in these cases was at variance with the position of the Comptroller General but that the Supreme Court had not considered the matter, thus giving rise to an uncertainty, in the view of the Secretary, as to the status of such employees under the Tort Claims Act. But the Secretary was quite certain that Guardsmen in a non-federal status were not covered since it had been so held, citing *McCranie* v. *United States*, 199 F. 2d 581 (5th Cir. 1952), so that an administrative remedy was thought desirable—if any there was to be—instead of imposing a new kind of liability on the United States under the Tort Claims Act wherein liability is based upon *respondeat superior*. S. Rep. No. 1502, *supra*, at 6–7.

subsequent legislation supports this view. The fact that this caretaker was also an officer of the National Guard with other duties in that respect did not remove him from the federal employee status while he was actually performing the duties incident to that status.

Not only was the Captain an employee of the United States but he was also "acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law",* of Maryland where the negligence occurred. A private person in Maryland is liable for the negligence of his servant in the circumstances set forth in *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957):

> [T]here are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these *indicia*, excepting (4), seem controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the *right to control and direct the servant in the performance of his work and in the manner in which the work is to be done*. It will be noted from the above, it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his *right* to do so that is important. Sun Cab Co. v. Powell, 196 Md.

*28 U.S.C. § 1346(b).

572, 578, 77 A.2d 783 * * *. [Emphasis in the original.]

The emphasis here is on the right of control, which, as we have seen, was in the United States, notwithstanding the particular flight could be said to have been under some supervision by the State as to its timing in relation to other activities at the airfield.

Since there is no question on the appeal as to the finding of negligence by Captain McCoy, nor of the amount of damages awarded to the individual plaintiffs, the judgments for the latter will be affirmed.

There remains the contention of the United States that the judgment of $1,210,000 awarded to Capital Airlines, Inc., due to complete demolishment of its airplane, was excessive. The court arrived at this amount because of its view that the evidence showed Capital could make itself whole only by purchasing a new airplane of the same type, no used airplanes of the type being available, and the evidence showed that a new plane would cost $1,210,000.[7]

The original cost of the plane was $1,074,020 in January 1956. It had been in service for over two years when it was destroyed and was then about ready for overhaul. The evidence shows that some other airplanes, of a different version of the Viscount, had been sold when about two years old by Capital for several hundred thousand dollars less, per plane, than their original cost when new. And the record also shows that the destroyed airplane was carried on Capital's books at a depreciated value of some three hundred thousand dollars less than original cost. The trial court, as we have indicated, was more impressed by the fact that a replacement aircraft for the one

[7] The judgment was for $1,216,050, the difference of $6,050 being expense incurred by Capital, as to which item separately considered no objection is made.

lost could only be had from the makers, so that "new" price would have to be paid if an identical substitute were to be obtained. It is clear then that what was awarded was replacement value and not fair market value.

In the usual case—and we think Maryland is in accord—courts seek to compensate an injured party for its loss caused by the fault of another; and the loss in personalty is in terms of value at the time of the loss. An objective measure of value is usually meant, in other words what a willing buyer would have paid a willing seller in an arm's length transaction for the article in question just before it was lost, or, in other words, market value. *United States* v. *Toronto Nav. Co.*, 338 U.S. 396 (1949); *Boston Iron & Metal Co.* v. *S.S. Winding Gulf*, 85 F. Supp. 806 (D. Md. 1949); *Bailey* v. *Ford*, 151 Md. 664, 135 Atl. 835 (1927); *McCormick on Damages* § 44 (1935); 73 A.L.R. 2d 722 (1960).

Sometimes fair market value cannot be determined, or would be inadequate, as when, for example, the article destroyed was unique or possessed qualities the special nature of which could only be appreciated by the owner. In such a case additional principles are helpful in determining proper compensation to the injured party. See *McCormick*, *supra*, § 45. In the case before us, however, both parties agree that the proper measure to be applied is fair market value. And replacement value—however probative it may or may not be in establishing market value—is not the equivalent of market value. *Cf. Bailey* v. *Ford*, *supra*; *C. & P. Telephone Co.* v. *Public Service Comm'n.*, 201 Md. 170, 93 A. 2d 249 (1952).

There was evidence from which the trial court could have found the fair market value of the airplane at the time of its destruction. Accordingly, the conclu-

sion that Capital was entitled to replacement value was erroneous and must be reversed. On remand new findings on this aspect of the case may be made consistent with this opinion, with privilege to the parties of adducing additional evidence if the court in its discretion permits.

Judge Danaher is of the opinion, however, that the evidence sustains the trial court's conclusion as to damages to Capital, deeming the situation here presented to be unique, and that we should not hold that the trial court should not have found as it did as to Capital's damages.

Nos. 16953 and 16954 affirmed;
No. 16955 reversed and remanded.

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1962

Filed June 13, 1963

No. 16953

Civil 1236–59

UNITED STATES OF AMERICA, APPELLANT.

v.

STATE OF MARYLAND, FOR THE USE OF MARY JANE MEYER, ET AL., APPELLEES

No. 16954

Civil 1237–59

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MARYLAND, FOR THE USE OF VANCE LEWMAN BRADY, WIDOW, ET AL., APPELLEES

No. 16955

Civil 1238–59

UNITED STATES OF AMERICA, APPELLANT

v.

CAPITAL AIRLINES, INC., A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: FAHY, DANAHER and BURGER, Circuit Judges

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that:

(1) The portion of the judgment of the District Court on appeal in Nos. 16953 and 16954 is affirmed; and

(2) The portion of the judgment of the District Court on appeal in No. 16955 is reversed, and this case is hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per *Circuit Judge* FAHY.

Dated: June 13, 1963.

Circuit Judge Danaher would affirm No. 16955 and accordingly dissents from the court's reversal and remand of that case.

APPENDIX B

Legislative Developments Concerning Civilian Employees of the National Guard

There were civilian employees of the militia long before Congress authorized the use of federal funds for their pay.[1] Although Congress provided federal arms and equipment for the militia virtually from the country's beginning,[2] it was not until early in this century that it began to appropriate funds for the compensation of Guard members and civilian employees. In 1908, soon after the States were empowered to use federal funds for paying military trainees (Sec. 14, Act of January 21, 1903, 32 Stat. 777; 10 Comp. Dec. 227, 228), they were given authority to use such funds for the compensation of Guardsmen in civilian capacities (14 Comp. Dec. 631).

The so-called caretaker statute (32 U.S.C. 709) was adopted as Sec. 90 of the National Defense Act

[1] For example, the Maryland statutes long authorized the employment of "armorers." Md. Rev. Code of 1878, Art. 18, §§ 28–33. Similar positions appear to have existed since colonial times. Act of Maryland General Assembly, Oct.–Nov. Sess., 1678, 7 Archives of Maryland (Md. Hist. Society 1889) 59. See, now, Md. Anno. Code, Art. 65, § 10.

[2] See Act of April 23, 1808, 2 Stat. 490. Previously, each member of the militia was apparently expected to furnish his own arms. Act of May 8, 1792, Sec. 1, 1 Stat. 271. Although Congress originally did not specify the ownership of such arms and equipment (R.S. § 1661) it provided, beginning in 1887, that they should remain the property of the United States, but that the States would be charged with the responsibility of caring for them. Act of Feb. 12, 1887, 24 Stat. 401. See 32 U.S.C. 105(a)(1), 702 (a) and (d), and 710(c).

of 1916.[3] That Act reshaped the National Guard into its present form, providing for the allotment of federal funds to the States for the supplies, equipment, and salaries of the Guard on condition that the States adhere to the discipline and standards prescribed by the federal government. Originally, "the men to be compensated" were enlisted men of the battery or troop, "detailed by the battery or troop commander." 39 Stat. 205–206. Since these men were to be selected by their commanding officer (a State official), and the maintenance and care of the property were the function and responsibility of the State (Secs. 82–89 of the National Defense Act, 39 Stat. 203–205, now found at 32 U.S.C. 702(d), 710 (b)), it would seem clear that they were to be State employees in their civilian (caretaker) capacity, as well as in their military status.

Although Section 90 was amended several times in the two decades following its enactment, the basic relationships remained unchanged. Two of the amendments are pertinent to the problem presented here. In 1926 Congress authorized, for the first time, the compensation of National Guard officers for full time civilian employment. Act of May 28, 1926, ch. 417, § 1, 44 Stat. 673, 32 U.S.C. 709(d). The authorization was limited to air squadrons, and to one officer per squadron. The purposes of the amendment were (a) to secure the more efficient maintenance and care of airplanes, and (b) to provide "an officer constantly on duty * * * for the supervision of flying training." H. Rep. No. 1031, 69th Cong., 1st Sess., p. 3; Sen. Rep. 785, 69th Cong., 1st Sess., p. 1. Thus, the first officers of the State National Guard to occupy a civilian "caretaker" or air technician status were to perform in that capacity a function (conduct of training)

[3] 39 Stat. 166.

reserved to the States by the Constitution (Art. I, Sec. 8, cl. 16) and by statute (Section 91 of the National Defense Act of 1916, 39 Stat. 206, now 32 U.S.C. 501(b). Nothing in the statute or legislative history indicates that Congress intended this State function to be performed by a federal employee. It therefore seems clear that in 1926, as in 1916, Congress considered the members of the National Guard "detailed" for caretaker employment by their organization commander to be full-time civilian employees of the State, and not the federal government.

The statutory provision that the "caretakers" were to be "detailed" by the commander of the organization having custody of the equipment restricted their selection and efficient use. Accordingly, in 1935 Congress (at the request of the National Guard Association and the adjutants general of the States) authorized the pooling of caretakers by providing that the Secretary designate "by whom they shall be employed." Act of June 19, 1935, ch. 277, 49 Stat. 391, 392. The legislative history shows clearly that Congress used that language merely to allow the Secretary to designate which State officials should employ the caretakers. The committee reports make this intention clear (Sen. Rep. 635, 74th Cong., 1st Sess., pp. 2–3):

> Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law *States* are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper State *official* of the caretakers as a pool. * * * [Emphasis added.]

Nothing in the legislative history supports the view that the Secretary was given authority to authorize their employment by a federal official, or in any other way to treat them as federal employees. Interventing

administrative decisions were to the same effect, i.e., 21 Comp. Gen. Dec. 305.

Although the statute remained unchanged, beginning in 1946 the statutory restriction that only one officer be employed per squadron was in effect lifted when the Secretary was authorized in the Appropriations Act to use federal funds to support the employment of as many caretakers as he "deemed necessary." Act of July 16, 1946, ch. 583, § 1, 60 Stat. 556. Subsequent appropriation acts contained similar provisions. See Historical Note, 32 U.S.C., pp. 5768-9.

The testimony before the Appropriations Committees in support of the appropriation of federal funds for the National Guard air technician program is to the same effect, consistently characterizing such persons as civilian employees of the respective States. For example, General Wilson, the ranking air officer of the National Guard Bureau, gave the following thumbnail description of the air technician program (Volume 4, Hearings before the Subcommittee of the House Appropriation Committee, 84th Cong., 2d Sess., relative to the Department of the Air Force appropriation for fiscal 1957 (p. 1303)):

> Our full-time employees, which we call air technicians, are the backbone of our organization. They serve in a dual capacity; as military members of the Air National Guard and as civilian employees of their respective States. * * *

To the same effect, see Hearings, *supra*, at pp. 98-99. With this understanding of the air technician's status as a State employee, Congress annually passed appropriation bills which authorized the use of federal funds for as many officer air technicians as the Secretary of the Air Force deemed advisable. E.g., Pub. L. 85-117, Aug. 2, 1957, title V, 501, 71 Stat. 322

Act of July 2, 1956, ch. 488, title V, § 501, 70 Stat. 466. See Historical Note, 32 U.S.C., pp. 5768–69.

Despite the decisions of appellate courts that employees receiving pay pursuant to the caretaker statute are federal employees (see fn. 15, *supra*, p. 17), Congress has repeatedly rejected this characterization and enacted legislation treating them as employees of the States. For example, in 1954 Congress established a separate coverage group under the Social Security Act for "[c]ivilian employees of National Guard units of a State who are employed pursuant to section 90," since "[t]he Department of Defense does not regard these employees as Federal employees." Act of Sept. 1, 1954, 68 Stat. 1059, amending 42 U.S.C. 418(b)(5); H. Rep. 1698, 83d Cong., 2d Sess., p. 50; Sen. Rep. 1987, 83d Cong., 2d Sess., pp. 45–46. Similarly, in 1956 Congress authorized federal disbursing officers to make payroll deductions for such employees for State retirement programs, noting that "These employees, although paid from Federal funds, are considered to be State rather than Federal employees." Act of June 15, 1956, 70 Stat. 283, 5 U.S.C. 84d; Sen. Rep. 2045, 84th Cong., 2d Sess., p. 1. Accord: Pub. L. 87–224, Sept. 13, 1961, 75 Stat. 496, 5 U.S.C. (*Supp. IV*) 84d and 32 U.S.C. (*Supp. IV*) 709(f) (concerning federal contribution to State retirement funds); H. Rep. 786, Sen. Rep. 709, 87th Cong., 1st Sess.

A recent legislative development demonstrates the continuing congressional understanding that National Guard personnel are employees of the State in their civilian, as well as their military, capacity. In 1960, a bill was introduced, with the backing of the National Guard Association, which would have extended the coverage of the Tort Claims Act to make the United States liable for the negligence of both civilian em-

ployees and military members of the National Guard.[4] The Department of the Army (acting for the Defense Department) and the Department of Justice opposed the bill, chiefly on the ground that, since there was no federal control over the National Guard (except when in federal service), the federal government should not be held accountable for the torts of Guard members and employees. H. Rep. 1928, 86th Cong., 2d Sess., p. 7; Sen. Rep. 1502, 86th Cong., 2d Sess., pp. 8, 11. In addition, the Department of Justice opposed the provision in regard to civilian employees on the ground that the *Holly* line of cases already provided for relief.[5] The Secretary of the Army, however, in a letter to Representative Celler, Chairman of the House Judiciary Committee, pointed out that since the view expressed by the federal courts in *Holly* and other cases was at variance with the long-standing administrative interpretation of the Comptroller General, and since this Court had not considered the question, there was "uncertainty" as to the status of such employees with respect to coverage by the Tort Claims Act. The Secretary went on to recommend that, instead of extending the reach of the Tort Claims Act, Congress should provide a limited administrative remedy for claimants injured by negligent conduct of National Guard members. H. Rep. 1928, *supra*, p. 6.

Congress refused to modify the scope of the Tort Claims Act. Instead, adopting the recommendation of the Department of the Army, it established a limited administrative remedy for injuries caused by civilian employees, as well as military members of the Guard. Pub. L. 86–740, 32 U.S.C. (Supp. II) 715. In effect, the amendment authorized the Secre-

[4] Hearings on H.R. 5435 and 9315, before the House Judiciary Committee, 86th Cong., 2d Sess., p. 12.

[5] Sen. Rep. 1502, 86th Cong., 2d Sess.

tary of the Army or Air Force to settle claims against the United States up to an amount of $5,000, and to certify claims in excess of that amount to Congress, for payment. The Senate Committee explained its refusal to expand the coverage of the Tort Claims Act in the following terms (Sen. Rep. 1502, 86th Cong., 2d Sess., p. 4):

> The crux of this matter lies in the fact that the National Guard is primarily under State control, as opposed to Federal control. * * *

Similarly, the House Committee believed that it would be "unwise to extend the coverage" of the Act to include conduct of civilian and military members of the Guard, since "Federal authorities do not have command and control over National Guard units and members not in active Federal service." H. Rep. 1928, 86th Cong., 2d Sess., p. 4.

In declining to widen the coverage of the Tort Claims Act, Congress ratified the line of cases holding that members of the National Guard acting in a military capacity are not federal employees. It did not, however, approve the *Holly* line of decisions holding the contrary with respect to civilian employees. On the contrary, in providing an administrative remedy for the torts of Guard members performing civilian, as well as military, duties, Congress impliedly rejected the contention of the Department of Justice that those decisions rendered legislation unnecessary and accepted the Defense Department's view that there was "uncertainty" as to the status of "caretakers and clerks." 106 Cong. Rec. 18383. And in according the same treatment to military and civilian personnel, it necessarily rejected the distinction upon which the *Holly* line of decisions was based.

U.S. GOVERNMENT PRINTING OFFICE 1964